

Lebovits v Bassman

2009 NY Slip Op 33357(U)

December 22, 2009

Supreme Court, Orange County

Docket Number: 9453/2008

Judge: Elaine Slobod

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ELAINE SLOBOD, J.S.C.

SUPREME COURT : ORANGE COUNTY
-----X

GEORGE I. LEOVITS, as a Member of
BLT Monroe, LLC,

Plaintiff,

-against-

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

GERSHON BASSMAN, BASSMAN FAMILY
LLC, and OSCAR TAUBER, Individually
and as members of BLT Monroe, LLC
and Bassman Family, L.P.,

Defendants. Index No. 9453/2008
Motion Date: Nov. 13, 2009

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BASSMAN FAMILY, LLC, GERSON BASSMAN
and BASSMAN FAMILY, L.P., Individually
and i/s/h/a Gershon Bassman, as
Members of BLT MONROE, LLC,

Third-Party Plaintiffs,

-against-

BLT MONROE, LLC, GEORGE LEOVITS, as
a Member of BLT MONROE, LLC
and OSCAR TAUBER, as a past and/or
present member of BLT MONROE, LLC,

Third-Party Defendants.

-----X

The following papers numbered 1 to 13 were read on this motion by
defendants/third-party plaintiffs 1) for an order disqualifying
Tarshis, Catania, Liberth, Mahon & Milligram, PLLC and Ostrer
Rosenwasser from representing plaintiff/third-party defendant George
I. Lebovits and third-party defendant BLT Monroe, LLC; 2) dismissing
the counterclaims stated in the third-party answer [CPLR 3211(a)(6);

CPLR 3211(a)(7)]; and 3) striking the complaint and third-party answer [CPLR 3126] and this cross-motion by plaintiff/third-party defendant George I. Lebovits for 1) an order granting leave to amend the complaint [CPLR 3025]; 2) appointing a temporary receiver for BLT Monroe, LLC, or, alternatively, 3) appointing independent counsel to represent BLT Monroe, LLC; and 4) an order compelling inspection of the records of the limited liability company [Limited Liability Company Law § 1102]:

Notice of Motion-Affirmation-Exhibits A-N.....1-3
 Notice of Cross-Motion-Affirmations-Exhibits A-D.....4-8
 Reply Affirmation-Exhibit A.....9-10
 Reply Affirmation-Reply Affidavit-Exhibits A-D.....11-13

Upon the foregoing papers it is ORDERED that this motion and cross-motion are decided as hereinafter indicated:

In 1998, plaintiff and defendants Gershon Bassman and Oscar Tauber formed a business relationship to own and operate a shopping center in Monroe, New York. To that end, they formed BLT Monroe, LLC, to be the lessee of a lease for the shopping center from Bassman Family, LLC which was to take title. Each of the three members was to have a one-third interest in BLT Monroe, LLC (hereinafter "the LLC").

Plaintiff alleges that Bassman bought Tauber's interests in the LLC thereby making him a minority member. Plaintiff alleges that in November, 2007, the premises were refinanced for 4.8 million dollars of which 2.2 million dollars were to be distributed to the members of the LLC. Plaintiff claims that defendant Bassman is wrongfully withholding \$746,000.00 from him. The complaint does not name the LLC as a separate party defendant. It states causes of action sounding in shareholders derivative suit, breach of fiduciary duty and "appropriation of business opportunity" and for an accounting. Plaintiff then served an amended complaint adding Bassman Family, L.P. as a party defendant, alleging that Tauber had possibly transferred his interest in the business to that entity.

Defendants commenced a third-party action naming themselves as "Bassman Family LLC, Gershon Bassman, and Bassman Family, L.P., individually and i/s/h/a Gershon Bassman, as Members of BLT Monroe, LLC". The parties purportedly impleaded are "BLT Monroe, LLC, George I. Lebovits, as a Member of BLT Monroe, LLC, and Oscar Tauber, as a past and/or present Member of BLT Monroe, LLC". The third party complaint alleges that plaintiff refused to invest in modernization and refurbishment of the Monroe Shopping Plaza in order to make the property more appealing to tenants and only objected to Bassman's acquisition of Tauber's interest when he realized that as a minority member he could not prevent the refurbishment. Defendants/third-party plaintiffs further allege that the members of the LLC had agreed that when the property was refinanced, the lease would be amended to increase the rent from the LLC to the title owner of the shopping center. They ask for reformation of the lease, dissolution of the LLC and derivative relief further alleging that plaintiff has misappropriated funds from the LLC.

The motion and cross-motion presently before the court concern, in part, housekeeping measures with respect to the pleadings.

Until February 14, 2008, there was a conflict of authority as to whether members of a limited liability company could bring derivative suits in the name of the corporation. The conflict arose because when the Legislature enacted the Limited Liability Company Law in 1994 it omitted a proposed Article IX entitled "derivative actions". The Appellate Division, Second Department reasoned that the omission of Article IX evinced a legislative intent not to allow such actions

(see Hoffman v Unterberg, 9 AD3d 386 [2004], while the Appellate Division, First Department, refusing to follow the Second Department, held that such actions were rooted in the common-law and found that the specific lack of a statutory grant of a right to bring such a claim was not fatal (see Tzolis v Wolff, 39 AD3d 138 [2007])).

On February 14, 2008, however, the Court of Appeals resolved the conflict between the departments by affirming the First Department's order in Tzolis (10 NY3d 100). The Court of Appeals agreed with the First Department that the derivative suit was a creature of case law and was first recognized by New York courts in 1832 (Robinson v Smith, 3 Paige Ch. 222 [1832]). Although the rule that derivative suits could be brought on behalf of business corporations was later codified by statute, the right to bring the lawsuit derives from trust law and the equitable principle that a fiduciary is answerable to those for whom the trust is formed if the fiduciary fails to perform his or her duty.

The Tzolis court acknowledged the dissent's concern that absent statutorily established safeguards in the form of, for example, demand requirements as a prerequisite to suit but stated "the right to sue has never been 'unfettered', and the limitations on it are not all of legislative origin. ... What limitations on the right of LLC members to sue derivatively may exist is a question not before us today. We do not, however, hold or suggest that there are none" (10 NY3d at 108-109).

The complaint in this case was filed on September 2, 2009, after the Tzolis decision. The LLC was not in and of itself named as a party. Defendants insisted that it should be and therefore impleaded

it. Plaintiff's counsel then appeared both for plaintiff and the third-party defendant LLC. Defendants move to disqualify plaintiff's counsel from doing so. Plaintiff counters that the court should either appoint independent counsel for the LLC or a temporary receiver with the power to hire counsel.

Generally, "[w]hile a corporation is usually a passive litigant in a stockholder's derivative action, the equitable relief sought may require an appearance and answer by the corporate defendant. Generally, however, the corporation is merely a nominal party defendant being in reality the plaintiff, but in any event it is an indispensable party (see generally 15 NY Jur2d, Business Relationships § 1241)." In this case, where plaintiff claims that the majority owner of the LLC is breaching his fiduciary duties to the corporate shareholders the court finds that the LLC is a proper party plaintiff, especially since defendants counterclaim for its dissolution.

Accordingly, plaintiff is directed to amend its complaint adding the corporation as a party plaintiff within twenty days. Defendants shall assert any claims as counterclaims in their answer. The third-party action is hereby stricken. Plaintiff shall assert in the complaint any counterclaims stated in the third-party answer, which were not stated in the complaint, that he wishes to pursue. Leave to amend is freely given at this stage of the litigation. Since new pleadings are to be exchanged, the parties shall make all claims they wish to assert in the complaint, answer and any reply.

Since defendants will presumably continue to request judicial dissolution of the LLC, Louis Sherwin, Esq. of

[* 6]
34 Grove Street, P.O. Box 310
Middletown, New York is appointed temporary receiver of the LLC pursuant to Limited Liability Company Law § 703 to wind up the affairs of the LLC. Counsel will be heard at the next scheduled court conference as to the amount of bond to be posted pursuant to CPLR 6403. The corporation will appear by the receiver or any counsel he may wish to engage with the permission of the court. The court notes that although defendants' counsel opposes plaintiff's request for appointment of a receiver, defendants have demanded appointment of a "referee" to wind down the LLC's affairs in their answer.

Finally, those branches of the motion and cross-motion which concern pre-trial disclosure and inspection by plaintiff pursuant to Limited Liability Company Law § 1102(b) will be ruled upon at the next scheduled conference.

This matter is scheduled for status conference on February 2, 2010 at 9:15 a.m. at the Orange County Government Center, Courtroom #12, 285 Main Street, Goshen, New York. In the event that counsel receives notice of reassignment of this case, they are directed to consult that justice's chambers to confirm the date and time.

The foregoing constitutes the decision and order of the court.

Dated: December 22, 2009
Goshen, New York

E N T E R

Elaine Slobod
HON. ELAINE SLOBOD, J.S.C.

TO: TARSHIS, CATANIA, LIBERTH, MAHON & MILLIGRAM
Attorneys for Plaintiffs
P.O. Box 1479
Newburgh, New York 12550